MAR 23

No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,
PETITIONER

v.

HAWKES CO., INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

I. A jurisdictional determination is not "final agency action" 3
   A. A jurisdictional determination is an informational tool that assists landowners in assessing their rights and obligations under the CWA 3
   B. A jurisdictional determination is not "final agency action" because it does not determine legal rights or obligations, or impose legal consequences 5
      1. Agency action is not final unless it determines legal rights or obligations, or imposes legal consequences 5
      2. A jurisdictional determination does not alter legal rights or impose legal consequences 9
   C. The asserted practical consequences of a jurisdictional determination do not render it final agency action 16
II. Respondents have adequate alternative opportunities to obtain judicial resolution of CWA-coverage issues 20

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 8
Air Brake Sys., Inc. v. *Mineta*, 357 F.3d 632 (6th Cir. 2004) 6, 15, 17
Alaska Dep't of Envtl. Conservation v. *EPA*, 540 U.S. 461 (2004) 6
Aluminum Co. of Am. v. *United States*, 790 F.2d 938 (D.C. Cir. 1986) 22

Cases—Continued: Page

American Fed'n of Gov't Emps., AFL-CIO v. *O'Connor*, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, 474 U.S. 909 (1985) 16
Bennett v. *Spear*, 520 U.S. 154 (1997) 5, 7
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 22
Columbia Broad. Sys., Inc. v. *United States*, 316 U.S. 407 (1942) 8
Dalton v. *Specter*, 511 U.S. 462 (1994) 6, 7, 14
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) ..... *passim*
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 5, 6, 7, 14
Frozen Food Express v. *United States*, 351 U.S. 40 (1956) 16
Golden & Zimmerman, LLC v. *Domenech*, 599 F.3d 426 (4th Cir. 2010) 15
Holistic Candlers & Consumers Ass'n v. *FDA*, 664 F.3d 940 (D.C. Cir.), cert. denied, 133 S. Ct. 497 (2012) 15
Independent Equip. Dealers Ass'n v. *EPA*, 372 F.3d 420 (D.C. Cir. 2004) 6, 15, 16
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 8
New Jersey v. *United States Nuclear Regulatory Comm'n*, 526 F.3d 98 (3d Cir. 2008) 15
Port of Boston Marine Terminal Association v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970) 9, 16
Rochester Tel. Corp. v. *United States*, 307 U.S. 125 (1939) 8
Sackett v. *EPA*, 132 S. Ct. 1367 (2012) 6, 8, 22, 23

Cases—Continued: Page

Stillwater of Crown Point Homeowner's Ass'n v. *Kovich*, 820 F Supp. 2d 859 (N.D. Ind. 2011) 13
Toilet Goods Ass'n, Inc. v. *Gardner*, 387 U.S. 158 (1967) 8
United States v. *Cooper*, 482 F3d 658 (4th Cir. 2007) 13

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq* 2
5 U.S.C. 704 ..... 1, 20, 22
5 U.S.C. 706(2)(A) 19
Clean Water Act, 33 U.S.C. 1251 *et seq.* 1
33 U.S.C. 1251(a) 3
33 U.S.C. 1311 3
33 U.S.C. 1319 3
33 U.S.C. 1319(a) 11
33 U.S.C. 1319(b) 11
33 U.S.C. 1319(c) 13
33 U.S.C. 1319(c)(2)(A) 13
33 U.S.C. 1319(d) 13, 23
33 U.S.C. 1319(g) 11
33 U.S.C. 1344 3
33 U.S.C. 1344(p) 3
33 U.S.C. 1344(s)(1) 11
33 U.S.C. 1344(s)(3) 11
33 U.S.C. 1344(s)(4) 11
33 U.S.C. 1362(7) 3
33 C.F.R.:
Pt. 320:
Section 320.1(a)(6) 9
Section 320.4 21

Regulations—Continued: Page

Pt. 325:
Section 325.1(e) 21
Section 325.2(d) 21
Pt. 330:
Section 330.1(e) 18
Section 330.1(f) 18
Pt. 331 15
Section 331.2 ..... 9, 10
Section 331.5(a)(2) 10
App. C 15

Miscellaneous:

Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197 (1979) 12

Dep't of the Army, *Annual Report Fiscal Year 2011 of the Secretary of the Army on Civil Works Activities (1 October 2010–30 September 2011)*, http://cdm16021.contentdm.oclc.org/cdm/compoundobject/collection/p16021coll6/id/1548/rec/1 21

Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act (1989), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf 11

Miscellaneous—Continued: Page

Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act (1989), https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act 12

U.S. Army Corps of Eng'rs:

Regulatory Guidance Letter No. 90-06 (Aug. 14, 1990) 15

Regulatory Guidance Letter No. 05-02 (June 14, 2005) 12

Regulatory Guidance Letter No. 08-02 (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf 14

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REPLY BRIEF FOR THE PETITIONER

During the four decades since Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, the United States Army Corps of Engineers (Corps) has issued jurisdictional determinations on request, in order to inform property owners of the Corps' view on whether and to what extent their property falls within the CWA's coverage. A jurisdictional determination is not subject to immediate judicial review because it is not "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. A jurisdictional determination does not alter the range of legally available options, but simply gives the landowner additional information to consider in choosing among those alternatives.

Respondents primarily contend (Br. 16) that an affirmative jurisdictional determination (expressing the Corps' view that waters protected by the CWA are

present on the relevant tract) should be judicially reviewable because it creates a strong practical disincentive to development of the property. But agency statements of opinion regarding the legal status of particular conduct often influence private parties' decisions; indeed, they are useful for precisely that reason. Non-binding agency recommendations to a final decisionmaker outside the agency likewise can have significant practical impacts. Absent any alteration of legal rights and obligations, however, such practical effects are insufficient to render agency communications reviewable under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

Although the Corps' longstanding practice of providing jurisdictional determinations upon request affords significant benefits to landowners, the CWA neither mandates nor explicitly references that practice. If jurisdictional determinations are not subject to immediate review, a landowner may challenge the agency's coverage determination if it is denied a permit, is granted a permit on terms that it finds objectionable, or is subjected to an enforcement action. In enacting the CWA without providing for standalone jurisdictional determinations, Congress evidently contemplated that those avenues of judicial review, taken together, would provide an adequate means of resolving disputes about the scope of CWA coverage.

I. A JURISDICTIONAL DETERMINATION IS NOT "FINAL AGENCY ACTION"

A. A Jurisdictional Determination Is An Informational Tool That Assists Landowners In Assessing Their Rights And Obligations Under The CWA

1. The CWA requires that any discharges of pollutants into the "waters of the United States" must be authorized, either by the statute itself or by a permit. 33 U.S.C. 1362(7); see 33 U.S.C. 1251(a), 1311, 1344. A potential discharger may seek a permit, which if granted provides advance assurance that the discharges are lawful; may discharge without a permit if it is sufficiently confident that one is not required; or may avoid both potential liability and the costs of the permitting process by forgoing any discharges into areas that are even arguably protected by the Act. 33 U.S.C. 1319, 1344(p). That choice is not different in kind from the choices that regulated parties often face when the line between lawful and unlawful conduct is not wholly clear.

Judicial review of the Corps' final permitting decision is available under the APA. Alternatively, a landowner that discharges without a permit may argue in any subsequent enforcement proceeding that a permit was unnecessary, either because the discharges were not into CWA-protected waters or because they were otherwise authorized by the statute. If the Corps had never adopted its practice of issuing standalone jurisdictional determinations upon request, those would clearly be the only available avenues for judicial resolution of CWA-coverage disputes.

2. Respondents contend (Br. 16) that the affirmative jurisdictional determination in this case had "an inescapable coercive effect on Hawkes" by requiring

Hawkes to choose among the three options described above. But respondents would have been compelled to choose among the same three options if they had not sought a jurisdictional determination, if they had received a negative jurisdictional determination, or if the Corps had never adopted the practice of issuing jurisdictional determinations upon request. An affirmative or negative jurisdictional determination may substantially affect the recipient landowner's assessment of the relative advantages and disadvantages of the three options described above, but it does not affect the actual legality or illegality of any pollutant discharge.

Respondents seek to analogize a jurisdictional determination to "a permit grant or permit denial, which the Corps admits are reviewable under the APA." Resps. Br. 26. As our opening brief explains (at 39-40), that analogy is inapt. The Corps' issuance of a CWA permit does not reflect the agency's opinion that the authorized discharges are already lawful; it *causes* those discharges *to be* lawful. That is precisely the operative legal effect that a jurisdictional determination lacks.

3. Respondents and their amici suggest that acceptance of the government's position would have disruptive effects on large numbers of landowners whose activities are potentially subject to the CWA. Until the decision below, however, no court had held that a standalone jurisdictional determination is reviewable final agency action. Holding that jurisdictional determinations are not immediately reviewable therefore would not impose any new disability on landowners, but would simply reaffirm that they may

obtain judicial review of CWA-coverage questions only through the mechanisms they have previously utilized.

B. A Jurisdictional Determination Is Not "Final Agency Action" Because It Does Not Determine Legal Rights Or Obligations, Or Impose Legal Consequences

A jurisdictional determination is not immediately reviewable because it does not have an essential attribute of "final agency action": it does not determine "rights or obligations" or impose "legal consequences." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). In resisting that conclusion, respondents argue that the Court should discard or dilute the well-established "legal consequences" requirement. They also contend that a jurisdictional determination has various legal consequences. Neither argument has merit.

1. Agency action is not final unless it determines legal rights or obligations, or imposes legal consequences

a. This Court has long held that "two conditions" "must be satisfied" before agency action is considered final and reviewable: it "must mark the consummation of the agency's decisionmaking process," and it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178 (citations and internal quotation marks omitted); see Gov't Br. 25-26. Respondents argue (Br. 18-20) that one of those "two conditions" is enough, and that a jurisdictional determination should be considered "final agency action" if it satisfies *Bennett*'s first prong. That contention cannot be squared with *Bennett*, or with other decisions before and after *Bennett* that have applied the

same two-pronged standard. See, *e.g.*, *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371-1372 (2012); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 483 (2004); *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 234, 241 (1980).

Bennett's requirement that the challenged action must not only be the consummation of agency decisionmaking, but also must actually alter the legal obligations of regulated entities, serves a critical purpose. Numerous agency actions—for instance, letters stating an agency's interpretation of a statutory provision or its view as to an entity's obligation—may represent the consummation of agency decisionmaking with respect to particular issues. See, *e.g.*, *Air Brake Sys., Inc.* v. *Mineta*, 357 F.3d 632, 644 (6th Cir. 2004) (Sutton, J.). Subjecting every such communication to immediate judicial review, whether or not it has any concrete legal effect, would enmesh the courts in abstract, piecemeal disputes and disrupt agencies' administrative processes. It would also "muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business." *Independent Equip. Dealers Ass'n* v. *EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.).

The same principle applies when one agency provides a recommendation to another federal actor who has final decision-making authority. See *Franklin*, 505 U.S. at 796-799; *Dalton* v. *Specter*, 511 U.S. 462, 468-471 (1994). Transmittal of the recommendation may reflect the consummation of the recommending agency's work. But if the recipient is legally free to accept or reject the recommendation, that communica-

tion is "not final and therefore not subject to review." *Franklin*, 505 U.S. at 798. The Court in *Franklin* and *Dalton* reached that conclusion even though the consequence was to preclude any non-constitutional review at all, since the President (the official responsible for making the final decision under both statutory schemes) is not an "agency" for purposes of the APA. See *Franklin*, 505 U.S. at 800-801; *Dalton*, 511 U.S. at 470, 476-477. Here, by contrast, although respondents contend that alternative avenues of review are inadequate, judicial review of CWA-coverage issues is unquestionably available both in the permitting context and in enforcement proceedings. See pp. 20-24, *infra*.

b. Respondents argue (Br. 20-22) that, under *Bennett*'s second prong, an agency action need not impose "independent" legal consequences. Although their argument is somewhat cryptic, respondents appear to contend that the agency action itself need not "alter the legal regime" in order to be final. 520 U.S. at 178. That is incorrect.

Quoting the APA's exhaustive definition of "agency action," respondents assert (Br. 21) that the "language of the APA does not require 'agency action' to have 'independent' legal consequences." Respondents do not identify the specific language in the APA definition that they believe supports their argument. In any event, this Court has squarely held that, in order to constitute "final agency action" under the APA, a particular action "must be one by which rights or obligations have been determined," or from which "legal consequences will flow." *Bennett*, 520 U.S. at 178 (citation and internal quotation marks omitted). The Court in *Bennett* distinguished *Franklin* and *Dalton* on precisely that ground. See *ibid.* ("Unlike

the reports in *Franklin* and *Dalton*, which were purely advisory and in no way affected the legal rights of the relevant actors, the Biological Opinion at issue here has direct and appreciable legal consequences.").

In accord with that formulation, the agency actions this Court has held to be final have themselves altered the pertinent legal regimes by determining parties' rights or obligations. A published rule, for instance, is final when it has the "status of law," *i.e.*, when it is intended to impose binding legal obligations. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 151-152 (1967); *Columbia Broad. Sys., Inc.* v. *United States*, 316 U.S. 407, 418 (1942).[1] The EPA compliance order at issue in *Sackett* was final because it directed the recipient to take particular actions and imposed penalties for violating the compliance order itself. 132 S. Ct. at 1371-1372; see Gov't Br. 42-43. An agency order (such as a CWA permit) that determines whether a party's activities are exempted from or subject to a statutory prohibition is final because it "render[s] the prohibitions of the statute inoperative" or operative. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 133 (1939). In that situation, as respondents point out (Br. 22), the regulated party's obligations are set forth in the statute rather than the agency's order. But the agency's action nevertheless determines the actual

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[1] Although a published rule having the force of law is "final agency action" within the meaning of the APA, the susceptibility of such a rule to pre-enforcement review depends on a separate ripeness inquiry. See *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158, 162-165 (1967) (holding that published agency regulation was "final agency action" but was not ripe for judicial review); see generally *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *Abbott Labs.*, 387 U.S. at 152.

legality of the party's conduct by resolving whether the party must conform to the statutory requirements.

In arguing that an agency action can be immediately reviewable even if it does not have independent legal effect, respondents rely (Br. 21-22) on *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970). That decision is consistent with the Court's other "final agency action" precedents. The Federal Maritime Commission had authority to review the legality of filed tariffs under the Shipping Act and to modify, prohibit, or approve them. *Id.* at 65 & n.9. The Court held that an order establishing that the tariff was legal and enforceable was final. *Id.* at 65-66, 71. As respondents point out (Br. 22), the Court observed that the order was not "coercive," in that it did not affirmatively direct any party to take any particular action. *Port of Boston*, 400 U.S. at 71. But the order nonetheless determined rights or obligations by establishing that the tariff could be enforced.

2. A jurisdictional determination does not alter legal rights or impose legal consequences

a. A jurisdictional determination does not affect a landowner's ability to obtain a permit, see Gov't Br. 27-29, and it does not opine on whether the landowner's planned activities (of which the Corps may be unaware) would require a permit or predict whether a permit would be granted, see 33 C.F.R. 331.2. Respondents are therefore incorrect in arguing (Br. 24) that a jurisdictional determination "determines what exemptions and permits apply" if the landowner wishes to discharge pollutants into waters on its lands. Respondents rely (Br. 24-25) on a Corps regulation that states that the "Corps has authorized its district

engineers to issue formal determinations concerning the applicability of the [CWA] * * * and the applicability of general permits or statutory exemptions." 33 C.F.R. 320.1(a)(6). That language simply defines the responsibilities of Corps district engineers to include both sorts of determinations; it does not suggest that the second determination is encompassed within the first. Another Corps regulation unambiguously refutes respondents' reading of Section 320.1(a)(6) by stating that jurisdictional determinations "do not include determinations that a particular activity requires a [Corps] permit." 33 C.F.R. 331.2.

Respondents are also incorrect in asserting (Br. 27) that "the Corps is legally bound by the [jurisdictional determination] during the permit process." While the Corps is unlikely as a practical matter to revisit a recent jurisdictional determination during the permitting process, the applicant may trigger a reassessment by presenting new information. See Gov't Br. 5. And even without new information, the applicant may dispute the Corps' regulatory jurisdiction over a particular site in an administrative appeal of a permit denial, even if it has previously (and unsuccessfully) pursued an administrative appeal from the standalone jurisdictional determination. 33 C.F.R. 331.5(a)(2); Gov't Br. 29 n.7. In either circumstance, if the Corps is persuaded by the applicant's showing, it may reverse its earlier jurisdictional determination and conclude that no permit is necessary because CWA-protected waters are not present at the relevant site.

b. A jurisdictional determination also does not alter the recipient's potential legal exposure to CWA

liability, or alter the range of enforcement mechanisms the landowner might face. See Gov't Br. 29-33.

Respondents argue (Br. 27-28) that a jurisdictional determination gives rise to legal consequences because it is binding on the government in subsequent enforcement actions. That is incorrect. When the Corps or EPA considers enforcement action after the Corps has already issued a standalone jurisdictional determination, the agencies will as a matter of practice "rely" (Resps. Br. 27) on that determination and ordinarily will not revisit the determination absent some reason for doing so. But no statutory or regulatory provision legally binds either the Corps or the EPA to treat an existing jurisdictional determination as controlling if the agency comes to believe it is incorrect.[2]

The Corps' regulations do not limit its authority to revisit its own jurisdictional determinations, and it

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[2] The EPA or the Corps may institute a proceeding for administrative penalties, 33 U.S.C. 1319(g); the EPA may issue a compliance order, 33 U.S.C. 1319(a), or initiate a judicial enforcement action, 33 U.S.C. 1319(b); and the Corps may issue an order requiring compliance with a permit, 33 U.S.C. 1344(s)(1), or initiate a civil action seeking compliance with a permit and a penalty, 33 U.S.C. 1344(s)(3) and (4). In general, the Corps has primary enforcement authority for violations of Corps-issued permits and some unpermitted discharges, and the EPA handles more serious unpermitted discharges. See *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act* (1989), http://www.usace.army.mil/Portals/2/docs/civilworks/mous/enfmoa.pdf. If respondents, without requesting a permit, had commenced peat-mining operations on the relevant tract, the decision whether to initiate an administrative enforcement action would have been entrusted to the EPA.

will do so if new information warrants. Corps, Regulatory Guidance Letter No. 05-02, ¶ 1 (June 14, 2005). And the EPA is not legally bound by Corps jurisdictional determinations because the EPA has final authority, as between the two agencies, to construe the scope of the CWA's coverage. See Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att'y Gen. 197, 202 (1979). The Corps' issuance of a negative jurisdictional determination therefore would not preclude the EPA from instituting an enforcement action if it believed that CWA-protected waters were present at the relevant site and that the landowner had discharged pollutants into those waters.[3]

Respondents argue (Br. 28-29) that, in an enforcement action for unauthorized discharges, the government might introduce an affirmative jurisdictional determination as evidence of the landowner's know-

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[3] The agencies have established separate practices governing the division of authority in certain rare "special cases" not at issue here, *i.e.*, determinations of jurisdiction made by the EPA in limited circumstances "where significant issues or technical difficulties are anticipated or exist." *Memorandum of Agreement: Exemptions Under Section 404(f) of the Clean Water Act* § III.A (1989), https://www.epa.gov/cwa-404/memorandum-agreement-exemptions-under-section-404f-clean-water-act (MOA). The MOA provides that "determinations * * * made pursuant to this MOA or the 1980 Memorandum of Understanding on Geographic Jurisdiction of the Section 404 Program," which also addressed, in relevant part, "special case[]" determinations, "will be binding on the Government and represent the Government's position." *Id.* § VI.A. That statement establishes that an EPA "special case[]" determination will control within the government. The MOA does not address mine-run Corps jurisdictional determinations of the sort at issue here, or suggest that all jurisdictional determinations are legally "binding" on the agencies.

ledge of the CWA's applicability. But, to the extent that the defendant's knowledge of particular waters' CWA-protected status is relevant to any liability or penalty issue arising under the Act, the defendant's receipt of an affirmative jurisdictional determination would not conclusively establish that such knowledge existed.[4] The defendant would remain free to argue that, although he knew of the Corps' view that particular waters were covered by the Act, he believed that view to be wrong.

A jurisdictional determination also does not impose legal consequences in citizen suits. Respondents contend (Br. 27) that, in a citizen suit alleging that particular discharges violated the CWA, the plaintiff "can rely on the [affirmative jurisdictional determination] as prima facie evidence of a violation of the" CWA. But while an affirmative jurisdictional determination (like a private consultant's report) might be introduced as evidence in such a suit, it would not alter the plaintiff's burden of establishing each of the elements of a CWA violation, including the presence of waters of the United States. See *Stillwater of Crown Point Homeowner's Ass'n* v. *Kovich*, 820 F Supp. 2d 859, 899 (N.D. Ind. 2011). By the same token, the recipient

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[4] The courts of appeals generally have recognized that, because the status of particular waters as "waters of the United States" is a "jurisdictional element" of a CWA violation, the defendant in a criminal case need not be proved to have known the facts establishing CWA coverage in order to be found guilty of "knowingly violat[ing]" the Act. 33 U.S.C. 1319(c)(2)(A); see, *e.g.*, *United States* v. *Cooper*, 482 F.3d 658, 665-668 (4th Cir. 2007) (Wilkinson, J.). The court may consider the defendant's knowledge of such facts, and of the relevant waters' CWA-protected status, in assessing an appropriate penalty within the applicable statutory range. See 33 U.S.C. 1319(c) and (d).

of a negative jurisdictional determination might introduce it as evidence that any discharge did not occur into waters of the United States, see Corps, Regulatory Guidance Letter No. 08-02, ¶ 2.b(3) (June 26, 2008), http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08-02.pdf (a negative jurisdictional determination "can be used and relied on by the recipient" in defending against a citizen suit), but a negative jurisdictional determination does not preclude the imposition of liability as a matter of law, and the court is not required to give it any particular weight.

c. Respondents assert (Br. 25) that a jurisdictional determination has the "earmarks of final agency action" because it reflects a considered decision made after a relatively formal, structured agency process. But the APA requires finality, not formality. In *Dalton*, for example, the Court held that an official Department of Defense report recommending base closures was not final, despite the extensive formal procedures it reflected, because it was not binding on the President and accordingly had no operative legal effect. 511 U.S. at 469-470; see *Franklin*, 505 U.S. at 797; *Standard Oil*, 449 U.S. at 234, 241-243.

The procedural attributes on which respondents rely—that a jurisdictional determination reflects an "official" rather than "[p]reliminary" view, reached after careful scientific investigation, and that the Corps' regulations describe a jurisdictional determination as "final" (Br. 25)—reinforce the conclusion that the jurisdictional determination represents the consummation of agency decisionmaking and therefore satisfies *Bennett*'s first prong. They do not establish, however, that it has legal effect. See Gov't Br. 33-35 & n.8. Respondents also observe (Br. 25) that a

jurisdictional determination is "valid" for five years.[5] 33 C.F.R. Pt. 331, App. C. But the relevant question is not how long a jurisdictional determination remains valid, but whether it has binding legal effect during that period. For the reasons discussed above and in the government's opening brief, it does not. See pp. 9-14, *supra*; see also Gov't Br. 25-41.

d. A Corps jurisdictional determination thus is analogous to agency communications that inform regulated parties of the agency's view of the legal status of particular private conduct. Although this Court has not had occasion to address the question, the courts of appeals have repeatedly held that such statements are not final agency action because they do not effect legal consequences apart from those already imposed by the statute. See, *e.g.*, *Golden & Zimmerman, LLC* v. *Domenech*, 599 F.3d 426, 432-433 (4th Cir. 2010); see also *Holistic Candlers & Consumers Ass'n* v. *FDA*, 664 F.3d 940, 941-946 (D.C. Cir.), cert. denied, 133 S. Ct. 497 (2012); *New Jersey* v. *United States Nuclear Regulatory Comm'n*, 526 F.3d 98, 102 (3d Cir. 2008); *Independent Equip. Dealers Ass'n*, 372 F.3d at 428; *Air Brake Sys.*, 357 F.3d at 644. Those decisions reflect the recognition that, while agency guidance is likely to influence a regulated party's conduct, that effect on a party's own assessment of its

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[5] The five-year validity period reflects the Corps' conclusion that, once the agency has undertaken the investigation necessary to make the jurisdictional determination, it generally will not be an efficient use of resources to revisit the question whether waters of the United States are present on a particular tract. Absent contrary evidence, the Corps therefore presumes that physical conditions on the site are unlikely to change significantly during the ensuing five years. See Corps, Regulatory Guidance Letter No. 90-06, ¶ 2 (Aug. 14, 1990).

options does not amount to a legal consequence. *Independent Equip. Dealers Ass'n*, 372 F.3d at 428. If agency guidance were immediately reviewable, moreover, agencies would hesitate to devote limited resources to "giving * * * needed advice." *American Fed'n of Gov't Emps., AFL-CIO* v. *O'Connor*, 747 F.2d 748, 754 (D.C. Cir. 1984) (R.B. Ginsburg, J.), cert. denied, 474 U.S. 909 (1985).

Respondents rely (Br. 33-35) on decisions involving agency actions that, unlike jurisdictional determinations, had operative legal effects. In *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-45 (1956), the Court held that an Interstate Commerce Commission (ICC) order identifying the commodities that the ICC deemed to be exempted from regulation under the Interstate Commerce Act was final because it effectively functioned as a rule. The order was functionally equivalent to an "administrative regulation[]" interpreting the scope of the statutory exemption for "agricultural commodities," *Standard Oil*, 449 U.S. at 240 & n.8 (discussing *Frozen Food Express*), and thus "set[] the standard" governing how "an important segment of the trucking" industry would be permitted to do business. *Frozen Food Express*, 351 U.S. at 44. Similarly, the order at issue in *Port of Boston* was final because it determined the extent to which a tariff could go into effect. 400 U.S. at 65-66, 71. A jurisdictional determination has no comparable legal effect.

C. The Asserted Practical Consequences Of A Jurisdictional Determination Do Not Render It Final Agency Action

Respondents argue (Br. 30-39) that a jurisdictional determination's likely practical effect on a landown-

er's decisionmaking is sufficient to render the jurisdictional determination immediately reviewable. That argument lacks merit.

1. When an agency action does not alter the legal regime, even significant practical consequences do not render it reviewable. In *Standard Oil*, the Court held that an FTC complaint finding "reason to believe" that a party had violated the Federal Trade Commission Act was not final, even though it imposed the "substantial" "burden" of defending against the agency proceeding—a burden that entailed significant expense as well as reputational harm. 449 U.S. at 242; see *Air Brake Sys.*, 357 F.3d at 645 ("[A]dverse economic effects accompany many forms of indisputably non-final government action[,] * * * but that does not make the agency's action final."). In *Dalton* and *Franklin*, the Court held that the agency recommendations at issue were non-reviewable because they were not legally binding; the Court did not assess the practical impact those recommendations were likely to have on the President's decisionmaking.

Respondents' arguments illustrate why it would be unworkable to treat the practical incentives created by agency action as a sufficient basis for immediate judicial review. Respondents primarily contend (Br. 16) that immediate review is necessary because the cost of seeking a permit would be prohibitive for them. Even assuming that is an accurate description of their particular circumstances (respondents have not supported those assertions with evidence), it is doubtless not true for all or even most potential dischargers. The vast majority of discharges fall within general permits, and either can be undertaken without providing advance notice to the Corps (and therefore without

expending any resources on a permit request), 33 C.F.R. 330.1(e), or after completing the abbreviated, relatively inexpensive general-permit verification process, 33 C.F.R. 330.1(f). See Gov't Br. 8 (more than 54,000 general-permit verifications issued in 2015, compared with 3100 individual permits and 97 applications denied); *id.* at 47-48. The cost of obtaining an individual permit varies widely based on the circumstances, but it will sometimes be only slightly greater than for a general-permit verification, and even a substantial cost will sometimes be a small percentage of the applicant's planned expenditures for the project. See *id.* at 48. Generalized assertions that permitting costs may exceed an undefined threshold for an unknown number of potential dischargers provide no basis for holding that all jurisdictional determinations are immediately reviewable.

Respondents suggest in the alternative (Br. 37) that the finality analysis "should take into account the facts of this case," including the fact that respondents' own proposed peat-mining activities would require an individual permit. See *id.* at 38, 40. Under that approach, the same jurisdictional determination for the same property might have been treated as non-final if respondents had expressed a desire to undertake a more modest project for which a general permit might apply. Respondents cite no decision in which the Court has analyzed finality in that manner. That approach would also create an evident potential for manipulation, particularly if (as respondents contend, see *id.* at 38) the allegations in a plaintiff's complaint must be taken as true in assessing the practical impact of the challenged agency conduct.

2. In any event, immediate judicial review of a Corps jurisdictional determination would not necessarily provide the certainty respondents seek. A reviewing court's determination that a jurisdictional determination is "arbitrary [and] capricious," 5 U.S.C. 706(2)(A)—*i.e.*, that the Corps' administrative record did not support a reasonable belief that the property contains waters of the United States—would not prevent the Corps or the EPA from gathering additional evidence of CWA coverage and initiating enforcement action based on that evidence.[6] And if the court held that the jurisdictional determination was *not* arbitrary and capricious, the landowner could still argue, in a subsequent civil enforcement action, that the agency had failed to prove by a preponderance of the evidence that the property in question contained waters of the United States.

Allowing immediate judicial review of the Corps' jurisdictional determinations therefore would spawn piecemeal and potentially duplicative proceedings. That prospect might deter the Corps from engaging in an informational practice that is triggered by a landowner's request and is intended to benefit landowners as well as to promote compliance with the CWA.

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[6] Respondents' complaint appropriately recognized that, if judicial review is available, it should be "based upon the administrative record before the Corps at the time the Corps made its decision." J.A. 8. Although respondents requested "[a] declaration that [their] Property is not subject to the CWA," J.A. 26, that relief would be inappropriate even if respondents' suit is allowed to go forward and is ultimately successful. The only question properly before a reviewing court would be whether the Corps' administrative record adequately supported its jurisdictional determination—not whether the relevant tract actually contains waters protected by the CWA.

II. RESPONDENTS HAVE ADEQUATE ALTERNATIVE OPPORTUNITIES TO OBTAIN JUDICIAL RESOLUTION OF CWA-COVERAGE ISSUES

Even if a jurisdictional determination were "final agency action," APA review would be unavailable because a person who disagrees with such a determination has "other adequate remed[ies] in a court." 5 U.S.C. 704. The CWA authorizes the Corps and the EPA to issue permits for discharges that would otherwise violate the Act, and it provides for various forms of enforcement actions against alleged violators. Judicial review of CWA-coverage issues is available in both those contexts. Respondents contend that immediate judicial review of Corps jurisdictional determinations is an essential supplement to those mechanisms. Congress evidently did not share that view, however, since the CWA does not expressly contemplate standalone jurisdictional determinations.

A. Respondents assert (Br. 39-44) that seeking a permit is prohibitively costly. But cf. pp. 17-18, *supra*. That concern provides no basis for second-guessing Congress's evident determination that the permitting process affords an adequate avenue for obtaining pre-discharge resolution of CWA-coverage issues. Respondents also rely on unrepresentative cost figures, see Gov't Br. 47-48, and overlook the fact that lower-cost general permits account for the vast majority of permit grants. And while respondents assert (Br. 40) that they must commission studies costing $100,000 to pursue their own permit application, it is unclear how substantial those costs are in relation to respondents' project as a whole, which contemplates peat-mining on 150 acres of high-value wetlands over a 20-year period. J.A. 27.

Respondents suggest (Br. 46-47) that the Corps will use its control over the duration of the permitting process, and its requests for additional information from the applicant, to "wear down the applicant" until it abandons its permit request.[7] In fact, the Corps uses an iterative process of consultation and information requests so that it may reach a resolution that enables the applicant to implement its project consistent with the CWA and other federal statutes. See 33 C.F.R. 320.4 (Corps balances benefits of the proposed project and private ownership rights with public interest in preserving waters of the United States); Gov't Br. 47-49. That is why permits are rarely denied. In addition, Corps regulations protect applicants by establishing default deadlines and limiting information requests to those "deem[ed] essential." 33 C.F.R. 325.1(e); see 33 C.F.R. 325.2(d).

Respondents argue (Br. 41-44) that it is "[w]asteful and [u]nnecessary" to require landowners to undertake the permitting process even though it "has nothing to do with the question of jurisdiction." But im-

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[7] In 2011, the Corps issued approximately 3600 individual permits, approved approximately 53,000 projects under general permits, modified approximately 3100 existing permits, and determined for approximately 9900 applications that no permit was required. The Corps denied approximately 134 permit applications, and approximately 9700 were withdrawn. Permit denials were infrequent because "[m]ost projects which might otherwise have been denied a permit were modified or conditioned to meet Corps requirements, scaled down to qualify for approval under general permits, or withdrawn." Dep't of the Army, *Annual Report Fiscal Year 2011 of the Secretary of the Army on Civil Works Activities (1 October 2010–30 September 2011)*, at 45-1, http://cdm16021.contentdm.oclc.org/cdm/compoundobject/collection/p16021coll6/id/1548/rec/1.

mediate judicial review of a standalone jurisdictional determination, when a successful permit application could obviate the need for judicial intervention, would consume significant agency and judicial resources without definitively resolving the CWA-coverage issue. See *Standard Oil*, 449 U.S. at 242; see also p. 19, *supra*. Contrary to respondents' argument (Br. 43), the fact that the permit process may involve issues (such as mitigation and timing) that are "irrelevant to the jurisdictional question" does not render it inadequate. Regulated parties often must wait to obtain review of an interlocutory agency order until the conclusion of administrative proceedings that address additional issues unrelated to that order. See *Standard Oil*, 449 U.S. at 241; *Aluminum Co. of Am.* v. *United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (Scalia, J.).

Finally, respondents argue (Br. 46, 50-53) that requiring a landowner to seek a permit "undermines the presumption of reviewability." *Id.* at 50 (capitalization altered). But the "presumption favoring judicial review of administrative action" governs resolution of the question whether a particular statutory scheme precludes review of agency action that satisfies Section 704's criteria. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). The disputed issue here, by contrast, is whether a jurisdictional determination falls within Section 704 to begin with, *i.e.*, whether it is "final agency action for which there is no other adequate remedy in a court." In *Sackett*, for example, the Court first determined that the compliance order was "final agency action" and that no other adequate judicial remedy existed, without applying any presumption in favor of review. 132 S. Ct. at

1371-1372. The Court then applied the presumption in considering whether the CWA precluded judicial review of the order. *Id.* at 1372-1373.

B. A recipient of an affirmative jurisdictional determination who elects to proceed with discharges may also obtain judicial review of the CWA-coverage issue if the government institutes an administrative penalty proceeding or judicial enforcement action, or if an aggrieved private plaintiff commences a citizen suit. Respondents argue (Br. 53-56) that those avenues for review are inadequate because the landowner may face steadily accruing statutory penalties if the court ultimately concludes that a CWA violation has occurred. See 33 U.S.C. 1319(d); *Sackett*, 132 S. Ct. at 1370. But a person who discharges without a permit would run that risk even if it had not received a jurisdictional determination, or if the Corps had never adopted the practice of furnishing such determinations upon request.

C. The adequacy of existing remedies is particularly clear when the two mechanisms described above are considered in tandem. By invoking the permitting process, a landowner can obtain judicial review of CWA-coverage issues without engaging in potentially unlawful discharges, and thus without subjecting itself to possible penalties if its view of CWA (non-)coverage is ultimately rejected. Alternatively, a landowner that wishes to avoid the administrative requirements of the permitting process can discharge without a permit and argue in any enforcement action that its discharges did not violate the Act. Respondents claim an entitlement to a third judicial-review mechanism that combines the most attractive (to the landowner) features of the two existing avenues, by allowing pre-

discharge review without prior recourse to the permitting process. Respondent identifies no sound basis for concluding, however, that the existing modes of review, taken together, are less than "adequate."

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

MARCH 2016